INDEX

	Page
Opinions below	2
Jurisdiction	2
Question presented	3
Constitutional and statutory provisions involved	3
Statement	4
Reasons for granting the writ	13
Conclusion	15

CITATIONS

Case:

Patricia Blau v. *United States*, 180 F. 2d 103, certiorari granted on May 15, 1950, No. 22, Oct. Term, 1950 ... 13, 14

Constitution and Statutes:

Fifth Amendment ... 3

Smith Act of June 28, 1940, c. 439, 54 Stat. 670 *et seq.*:
- § 2 [18 U.S.C. (1946 ed.) 10]:
  - (a)(3) ... 3
  - (b) ... 4
- § 3 [18 U.S.C. (1946 ed.) 11] ... 3, 4
- § 5 (a) [18 U.S.C. (1946 ed.) 13(a)] ... 5

18 U.S.C. [1948 rev.]:
- § 401 ... 5
- § 1001 ... 5
- § 2385 ... 3

In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 136

UNITED STATES OF AMERICA, PETITIONER

v.

SAMUEL H. KASINOWITZ, HENRY STEINBERG, AND BEN DOBBS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Ninth Circuit (5 R. 12)[1] reversing respond-

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[1] The record in this group of cases (Kasinowitz, Steinberg, and Dobbs) is contained in five volumes. Volumes 1 to 3, inclusive, are consecutively paginated and will be referred to herein by the designation "R." These three volumes contain the consolidated trial court records of the instant, or *Kasinowitz*, group of cases and of a cognate group of cases (*United States* v. *Lillian Adele Doran, et al.*). The latter group of cases involved judgments of civil contempt. They are now moot, due to the expiration of the term of the grand jury before which the alleged contempts occurred (this being

ents' convictions of criminal contempt of the District Court for the Southern District of California (R. 31-35).

OPINIONS BELOW

The opinion of Chief Judge Denman, in which Circuit Judges Stephens and Orr concurred (5 R. 3-11), Circuit Judge Pope's "concur[rence] in the result" (*id.*, 11), and the dissenting opinion of Circuit Judges Mathews, Healy, and Bone (*ibid.*) have not yet been reported.

JURISDICTION

The judgment of the Court of Appeals was entered on April 21, 1950 (5 R. 12),[2] and a petition

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the same grand jury as that involved in the *Kasinowitz* group of cases, which involve judgments of criminal contempt).

The fourth volume, the pagination of which commences anew with page 1, though bearing on its title page the indication that it is volume 4 of the joint *Kasinowitz-Doran* record, is actually a partial record of a third group of cases (*United States* v. *Frank Edward Alexander, et al.*), distinct from, though related to, the *Kasinowitz* and *Doran* groups. The *Alexander* group of cases, like the *Doran* group, involved judgments of civil contempt, and are likewise now moot. Kasinowitz, Steinberg, and Dobbs, the instant respondents, were also defendants in the *Alexander* group of cases. There is no occasion to make record references herein to this fourth volume.

The fifth volume, containing the proceedings in the Court of Appeals in the *Kasinowitz* group of criminal contempt cases, will be referred to herein by the designation "5 R."

[2] An earlier judgment of the Court of Appeals, entered February 4, 1950, was ordered vacated when the court entered its April 21 judgment (see 5 R. 3). Incident to the entry of the substituted judgment, Judges Denman, Stephens, and Orr filed a new opinion, and withdrew their former opinion, which had been rendered incident to the entry of the February 4 judgment (*ibid.*). The record does not contain their earlier opinion or the earlier judgment of the court.

for rehearing was denied on June 1, 1950 (*id.*, 12). The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1). See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

QUESTION PRESENTED

Whether a witness before a grand jury is privileged, by virtue of the Fifth Amendment's guaranty against compulsory self-incrimination, to refuse to disclose whether he knows a named individual, who he has grounds for believing is an officer of the Communist Party.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment of the Constitution provides in pertinent part:

> No person * * * shall be compelled in any criminal case to be a witness against himself * * *.

Sections 2, 3, and 5 of the Act of June 28, 1940, c. 439, 54 Stat. 670, 671, commonly known as the Smith Act, provided in pertinent part as follows:[3]

> Sec. 2 [18 U. S. C. (1946 ed.) 10]. (a) It shall be unlawful for any person—
>
> * * * * *
>
> (3) to organize or help to organize any society, group, or assembly of persons who

[3] These sections are now consolidated, with merely phraseological changes, as 18 U.S.C. 2385, except that the conspiracy clause of Section 3 is "omitted [from § 2385] as covered by the general conspiracy provision [§ 371]." See Reviser's note.

teach, advocate, or encourage the overthrow or destruction of any government in the United States by force or violence; or to be or become a member of, or affiliate with, any such society, group, or assembly of persons, knowing the purposes thereof.

(b) For the purposes of this section, the term "government in the United States" means the Government of the United States, the government of any State, Territory, or possession of the United States, the government of the District of Columbia, or the government of any political subdivision of any of them.

Sec. 3 [18 U. S. C. (1946 ed.) 11]. It shall be unlawful for any person to attempt to commit, or to conspire to commit, any of the acts prohibited by the provisions of this title.

* * * * *

Sec. 5 [18 U. S. C. (1946 ed.) 13]. (a) Any person who violates any of the provisions of this title shall, upon conviction thereof, be fined not more than $10,000 or imprisoned for not more than ten years, or both.

* * * * *

STATEMENT

On November 17, 1948, respondents were charged, in separate presentments (R. 2-4, 5-7, 8-10) returned by a grand jury duly empaneled and sworn by the District Court for the Southern District of California, with criminal contempt of

the court's authority, in violation of 18 U. S. C. 401, in that they refused without lawful cause to answer questions before the grand jury after having been instructed by the court to answer. Each presentment alleged that the grand jury, on or about November 3, 1948, "undertook an inquiry concerning certain employees of the United States Government, who had made false statements to an agency of the Government, in a matter within the jurisdiction of that agency and in connection with the investigation of their loyalty to the Government [in violation of 18 U. S. C. 1001 (formerly 18 U. S. C. 80)]" (R. 2, 5, 8); that "[i]n pursuance of such inquiry, it became necessary for said Grand Jury to inquire into and ascertain the official identity of one, Dorothy Healey; the identity of the person or persons in charge of the books and records of the Los Angeles County Communist Party showing or pertaining to the membership of said organization" (R. 2, 5, 8-9); that each respondent appeared before the grand jury pursuant to a subpoena and "there refused to answer certain questions propounded to him, he claiming that the answers thereto may tend to incriminate him" (R. 3, 6, 9); that each respondent thereafter, on November 12, 1948, was brought before District Judge Hall in open court, where the claim of privilege was challenged by the Government (*ibid.*); that Judge Hall, in open court, heard the questions propounded and the answers made, and thereafter heard each respondent "privately, in chambers, in

accordance with the request made by the said witness on the matter of how his privilege against self-incrimination would be violated by answering said questions" (*ibid.*); that Judge Hall, following these hearings, "found that there was no present danger of such tendency to incriminate the said witness * * *, and ordered him to return before the Grand Jury and answer the said questions" (*ibid.*); but that each respondent, notwithstanding the court's instructions, again refused to answer the questions upon being recalled as a witness before the grand jury later on the same day, each again basing his refusal to answer on the ground that his answers would incriminate him (R. 3-4, 6-7, 9-10).

The questions which each respondent was charged with having contumaciously refused to answer were: Whether he knew Dorothy Healey; her business or home address; her occupation; whether she was married, and, if so, her husband's name and occupation (R. 3, 6, 9).

On December 14, 1948, respondents filed in the district court a pleading designated a "Return to Presentments" (R. 21-31), setting forth that there was then pending in the District Court for the Southern District of New York an indictment against twelve members of the National Committee of the Communist Party, captioned *United States* v. *William Z. Foster, et al.*, charging them with violation of the Smith Act (*supra*, pp. 3-4)

"solely by virtue of their activities in organizing the Communist Party, said party being alleged in said indictments as an organization which teaches and advocates the overthrow of the United States government by force and violence" (R. 27); that there were also pending in the same court separate indictments charging the same defendants with violating the Smith Act "solely by virtue of their membership in the Communist Party knowing the same to be * * * an organization which teaches and advocates the overthrow of the United States government by force and violence" (*ibid.*); and that motions to dismiss these indictments had been denied and the cases set for trial (R. 27-28). The "return" also contained sworn statements by each respondent, based on "information and belief" (R. 30-31), that Dorothy Healey "is widely known to be an officer of the Los Angeles County Communist Party" (R. 26); that each respondent was asked the questions set forth in the presentments because the government attorneys who asked them "had information to the effect that Dorothy Healey was and is an officer of the Los Angeles County Communist Party" (R. 26-27); that, following the filing of the New York indictments referred to above, "it was officially announced by the Department of Justice that it was the plan and intention of the Attorney General * * * to obtain similar indictments against other persons in other cities of the United States, including spe-

cifically the City of Los Angeles, said indictments to be based solely upon the membership * * * of persons in the Communist Party" (R. 28); that the Attorney General "has by formal opinion ruled that the Communist Party advocates the overthrow of the government of the United States by force and violence" (*ibid.*); and that "it is the official policy and position of the Department of Justice that anyone who is a member of the Communist Party is a member of an organization which advocates the overthrow of the Government of the United States by force and violence" (R. 29). Accordingly, it was alleged, respondents were justified in refusing to answer the questions set forth in the presentments because answers to the questions "might furnish evidence of membership in or affiliation with the Communist Party, or such association with an officer of the Communist Party which might constitute a link in a chain of evidence establishing such membership or affiliation, or disclose the existence of other facts tending to establish such membership or affiliation, and thus create a reasonable likelihood of prosecution under the Smith Act" (R. 26).

At the trial of the presentments, held before Judge Hall, sitting without a jury (R. 211-316), the Government's evidence consisted of establishing, by the official court and grand jury transcripts of proceedings, respondents' initial refusal to answer before the grand jury the questions in issue, the

proceedings in open court and in the chambers of Judge Hall, the latter's instructions to respondents to answer the questions, and their second refusal to answer on being again summoned before the grand jury (R. 211-244). The record indicates that respondent Kasinowitz, in reporting to Judge Hall in chambers his reasons for believing that answering the questions in issue might tend to incriminate him, stated, *inter alia,* that he had "become aware of the fact that Dorothy Healey is or was a leading officer of the Communist Party in Los Angeles" (R. 227). Respondent Dobbs similarly stated in chambers that he had "read that Mr. Sparks and Mrs. Healey are leaders in the Communist Party" (R. 219).[4]

Respondents, in defense to the charges, sought to show that their claims of privilege in refusing to answer the questions in issue were justified on the ground that admissions by them that they knew Dorothy Healey, her address, occupation, and marital status might constitute links in a chain of evidence against them in possible future prosecutions under the Smith Act (R. 252-316). They offered to prove, but were prevented from attempting to prove by rulings that the proffered evidence was inadmissible, that the allegedly false statements by government employees which the grand jury in question was investigating were statements that

[4] Respondent Steinberg made no reference to Dorothy Healey in his statement to Judge Hall in chambers (R. 236-237).

they were not members of any organization that advocates the violent overthrow of the Government (R. 253-255, 266-267); that the grand jury had information to the effect that these government employees were members of the Communist Party and that it was that fact that made their statements false (R. 255, 267-268, 271-272); that the grand jury desired to obtain the membership records of the Communist Party of Los Angeles County for the purpose of ascertaining whether the government employees under investigation were listed in such records as members of the Party (R. 255-256, 277-278);[5] that the grand jury had information to the effect that Dorothy Healey was the organizing secretary of the Los Angeles County Communist Party and, in her capacity as such, had custody of the Party's membership records, and that it desired to verify that information (R. 256-260, 273-277); and that respondents were summoned to testify before the grand jury because that body had information that they were members of the Los Angeles County Communist Party and, by virtue of their membership, knew that Dorothy Healey was the Party's organizing secre-

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[5] Later in the trial, however, the then United States Attorney, Mr. Carter, stated for the record, and offered to stipulate, that the purpose of the grand jury inquiry was to ascertain the whereabouts of the membership records of the Los Angeles County Communist Party (R. 287-288).

tary and, as such, had custody of the membership records (R. 260-261, 278-279).[6]

Respondents also offered in evidence excerpts from two reports by a Joint Fact-Finding Committee on Un-American Activities of the California State Legislature (R. 283-284, 288, 291-292), in which it was stated that Dorothy Healey was organizing secretary of the Los Angeles County Communist Party (R. 284, 292); copies of the New York indictments against the twelve national leaders of the Communist Party (referred to in the "Return to Presentments", *supra*, pp. 6-7), and of the minute entry showing that a motion to dismiss these indictments had been overruled (R. 295-297, 327-333); and copies of a number of news items appearing in Los Angeles and other newspapers asserting or implying that the grand jury before which respondents appeared was making an "all-out" investigation of Communists in the Los Angeles area, possibly to be followed by indictments similar in nature to those pending in New York (R. 301, 302, 304, 305-306, 313-315, 338, 339-340).

[6] The rulings of Judge Hall excluding the proffered evidence appear to have been based primarily on the ground that matters presented to a grand jury and the details of its investigations are confidential and privileged (see R. 254, 258). However, in sustaining the Government's objection to a question as to whether or not one of the purposes of the grand jury was to establish that Dorothy Healey was organizing secretary of the Los Angeles County Communist Party, Judge Hall stated (R. 276): "A further ground and basis for my ruling is that it is immaterial whether Dorothy Healey is secretary of the Communist Party * * *. As I have heretofore ruled, that is no crime, to know anybody." Cf. 5 R. 10-11.

All this proffered evidence was excluded by Judge Hall on the ground that it was immaterial to the issue and, particularly as to the news items, that it was hearsay (R. 285-287, 292-293, 295-297, 301, 302-303, 306, 314-315).

Respondents were found guilty (R. 325) and each was sentenced to imprisonment for one year (R. 31-35). The Court of Appeals for the Ninth Circuit, sitting *en banc,* in a 4-to-3 decision, reversed the convictions and directed dismissal of the contempt proceedings (5 R. 11, 12).

Chief Judge Denman, speaking for himself and Judges Stephens and Orr, wrote an opinion, pointing out, *inter alia,* that the Attorney General, in September 1948, had labeled the Communist Party as a subversive group (5 R. 4); that respondents were among the ten persons involved in the *Alexander* group of cases (see fn. 1, *supra,* pp. 1-2) who had been asked before the grand jury, and refused to answer, only a week before respondents' grand jury appearances in the instant case, whether they knew the table of organization of the Los Angeles County Communist Party and the names and duties of its county officers (5 R. 4); that a news article appearing in a Los Angeles paper on the morning following the entry of the civil contempt judgments in the *Alexander* cases attributed to Mr. Carter, the United States Attorney, the statement that "This is only the opening gun in the government's inquiry into subversive and disloyal groups" (*ibid.,* 4); and that Dorothy

Healey had been publicly named by the California State Legislature's Joint Fact-Finding Committee on Un-American Activities as the organizing secretary of the Los Angeles County Communist Party (*id.*, 9). Accordingly, they concluded (*id.*, 11):

> We are of the opinion that, without the admission of the New York indictments, the evidence discloses a setting making it likely that the answers concerning Dorothy Healy and her husband may be directly incriminating or, if not, may lead to such evidence. As we said in our Alexander opinion of the question "Did you know Ned Sparks?" the tie-in with the incriminatory character of the prior questions to appellants concerning the names of the officers of and the organization and duties of the Los Angeles County Communist Party, is this evidence warranting appellants' belief that Dorothy Healy is that party's secretary. These appellants' defense in a criminal prosecution well may be that they knew no one connected with the Communist Party's conspiracy to violate the Smith Act.

Judge Pope stated merely that he "concur[red] in the result" (5 R. 11). Judges Mathews, Healy, and Bone dissented, stating simply, "We think that the judgments in all these cases should be affirmed" (*ibid.*).

REASONS FOR GRANTING THE WRIT

The decision below is in conflict with *Patricia Blau* v. *United States*, 180 F. 2d 103 (C.A. 10), cer-

tiorari granted on May 15, 1950, No. 22, Oct. Term, 1950. In the latter case, Patricia Blau was convicted of criminal contempt of court for refusing to state, on the ground that her answers would tend to incriminate her under the Smith Act, *supra,* pp. 3-4, the names of the officers of the Communist Party of Colorado, the organizational setup of the Party, and whether she had ever been employed by the Party or had possession of any of its books and records. Her conviction was upheld by the Tenth Circuit, which held that a witness before a grand jury has no privilege to refuse to disclose, because of an expressed fear of prosecution under the Smith Act, membership in or connection with the Communist Party. Because of the conflict between the *Blau* decision and the earlier decision of the court below in the *Alexander* group of cases (not yet reported), which was similar to its decision in the instant cases, we did not oppose the granting of certiorari in her case (see our memorandum in Nos. 20, 21, 22, Oct. Term, 1950).

The questions which respondents were convicted of contumaciously refusing to answer—whether they knew Dorothy Healey, her address, occupation, and marital status—did not, on their face, require answers disclosing association with the Communist Party or any of its officers, but the court below held that, in view of the factual setting in which the questions were asked, and the offers of proof which tended to show that Dorothy Healey

was an important officer of the Los Angeles branch of the Communist Party, affirmative answers would tend to show such association. This being so, the court held, they were justified in invoking their constitutional privilege against self-incrimination under the Smith Act. The judgment below is thus irreconcilable with the *Blau* decision. The basic question presented by both cases—whether a witness is privileged to refuse to disclose whether he is a member of or affiliated with the Communist Party, on the ground that admission of such membership or affiliation will tend to incriminate him under the Smith Act—is one of obvious importance which this Court should resolve.

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for a writ of certiorari should be granted.

PHILIP B. PERLMAN,
Solicitor General.

JUNE 1950.

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